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18

19 UNITED STATES DISTRICT COURT
20 CENTRAL DISTRICT OF CALIFORNIA
21 WESTERN DIVISION

22 **SMARTMETRIC, INC.,**

23 **Plaintiff,**

24 **v.**

25 **MASTERCARD INTERNATIONAL**
26 **INC. AND VISA INC.,**

27 **Defendants.**

28 **AND RELATED COUNTERCLAIMS.**

Case No. CV 11-07126 MWF
(AJWx)

**STIPULATED PROTECTIVE
ORDER**

Judge: Hon. Andrew J. Wistrich
Place: 690, Roybal

STIPULATED PROTECTIVE ORDER

The production of documents and other disclosure of information in this litigation shall be subject to the requirements and obligations set forth herein and in accordance with Rule 26(c) of the Federal Rules of Civil Procedure.

DEFINITIONS

1. “Party” shall mean: any party to this action, including all of its officers, directors, employees, consultants, retained experts, and outside counsel (and their support staff).

2. “Disclosure or Discovery Material” shall mean: all items or information, regardless of the medium or manner generated, stored, or maintained (including, among other things, testimony, transcripts, and tangible things), that are produced or generated in disclosures or responses to discovery in this matter.

3. “CONFIDENTIAL” shall mean: any Party’s or non-party’s confidential and nonpublic information, such as, but not limited to, personnel records, customer lists, and market surveys, the disclosure of which the Producing Party and/or the non-party contends could cause harm to the business operations of the Producing Party and/or the non-party, or provide improper advantage to others, and that is not otherwise marked or designated by the Producing Party as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

4. “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” shall mean: any Party’s and any non-party’s highly confidential and proprietary business, commercial, competitive, financial, marketing, sales, and technical information, such as, but not limited to, the details of commercial relationships between the Producing Party and its customers, strategic plans regarding the future development and commercialization of products, and proprietary technical specifications.

5. “Receiving Party” shall mean: a Party that receives Disclosure or Discovery Material from a Producing Party.

6. “Producing Party” shall mean: a Party or non-party that produces

1 Disclosure or Discovery Material in this action.

2 7. "Designating Party" shall mean: a Party or non-party that designates
3 information or items that it produces in disclosures or in responses to discovery as
4 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
5 ONLY."

6 8. "Protected Material" shall mean: any Disclosure or Discovery Material
7 that is designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL –
8 ATTORNEYS' EYES ONLY."

9 9. "Outside Counsel" shall mean: attorneys and their support staff who
10 are not employees of a Party but who are retained to represent or advise a Party in
11 this action.

12 10. "In-House Counsel" shall mean: attorneys and their support staff who
13 are employees of a Party.

14 11. "Counsel" (without qualifier) shall mean: Outside Counsel and In-
15 House Counsel, as well as their respective support staff.

16 12. "Expert" shall mean: a person with specialized knowledge or
17 experience in a matter pertinent to the litigation who has been retained by a Party or
18 its Counsel to serve as an expert witness or as a consultant in this action, along with
19 that person's staff. This definition includes a professional jury or trial consultant
20 retained in connection with this litigation. Pursuant to Section 6 below, an Expert
21 must become a "Qualified Expert" in order to view or access material designated as
22 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
23 ONLY."

24 13. "Professional Vendor" shall mean: Persons or entities that provide
25 litigation support services (e.g., photocopying; videotaping; translating; preparing
26 exhibits or demonstrations; organizing, storing, or retrieving data in any form or
27 medium; etc.) and their employees and subcontractors.

1 **1. SCOPE**

2 The protections conferred by this Order cover not only Protected Material,
3 but also any information copied or extracted therefrom, as well as all copies,
4 excerpts, summaries, or compilations thereof, plus testimony, conversations, or
5 presentations by Parties or Counsel to or in court or in other settings that might
6 reveal Protected Material.

7 **2. DURATION**

8 Even after the termination of this litigation, the confidentiality obligations
9 imposed by this Order shall remain in effect until a Designating Party agrees
10 otherwise in writing or a court order otherwise directs.

11 **3. DESIGNATING PROTECTED MATERIAL**

12 **3.1 Manner and Timing of Designations**

13 Except as otherwise provided in this Order, or as otherwise stipulated or
14 ordered, material that qualifies for protection under this Order must be so
15 designated before the material is disclosed or produced. Designation in conformity
16 with this Order requires the following:

17 (a) For information in documentary form (apart from transcripts of
18 depositions or other pretrial or trial proceedings), the Producing Party must affix
19 the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’
20 EYES ONLY” conspicuously on each page that contains Protected Material. A
21 Party or non-party that makes original documents or materials available for
22 inspection need not designate them for protection until after the inspecting Party
23 has indicated which material it would like copied and produced. After the
24 inspecting Party has identified the documents it would like copied and produced,
25 the Producing Party must determine which documents, or portions thereof, qualify
26 for protection under this Order, then, before producing the specified documents, the
27 Producing Party must affix the appropriate legend (“CONFIDENTIAL” or
28 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”) conspicuously on

1 each page that contains Protected Material. With respect to any electronic
2 documents that the Producing Party produces in native form, the Producing Party
3 will not be required to affix the appropriate legend (“CONFIDENTIAL” or
4 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”) on each native
5 page that contains Protected Material, but instead shall be required only to affix the
6 appropriate legend (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
7 ATTORNEYS’ EYES ONLY”) conspicuously on each page of the corresponding
8 non-native version of the produced document.

9 (b) For testimony given during a deposition or other pretrial or trial
10 proceeding, each Party and/or each Party’s Counsel present during the giving of
11 such testimony may identify testimony that it seeks to designate as
12 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
13 ONLY.” Once identified as such, this material shall be designated
14 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
15 ONLY” and immediately treated as such under the provisions of this Protective
16 Order. Each Party additionally may have up to 30 days after receipt of the official
17 transcript of the given testimony to identify any material that it seeks to designate
18 as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
19 ONLY.” The Party seeking such protection shall so notify the other Party in
20 writing and identify the portions of the testimony for which protection is sought.
21 Once identified, both Parties shall treat such material in accordance with the
22 provisions in this Protective Order.

23 (c) For information produced in some form other than documentary,
24 and for any other tangible items, the Producing Party must affix in a prominent
25 place on the exterior of the container or containers in which the information or item
26 is stored the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
27 ATTORNEYS’ EYES ONLY.” If only portions of the information or item warrant
28 protection, the Producing Party, to the extent practicable, shall identify the

1 protected portions, specifying whether they qualify as “CONFIDENTIAL” or as
2 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

3 3.2 Inadvertent Failures to Designate

4 If the Designating Party, within a reasonable time after producing documents
5 to the Receiving Party, discovers an inadvertent failure to designate qualified
6 information or items as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
7 ATTORNEYS’ EYES ONLY,” the Designating Party will not be deemed to have
8 waived its right to secure protection under this Order for such material. The
9 Designating Party shall, within a reasonable time, identify in writing to the
10 Receiving Party such materials or items the Designating Party seeks to designate
11 with the corrected level of protection indicated for those materials or items. Upon
12 receipt of such written notification, the Receiving Party shall make reasonable
13 efforts to assure that the material is treated in accordance with the provisions of this
14 Order.

15 3.3 Clawback Procedures

16 The inadvertent disclosure of a document that a Producing Party and/or a
17 non-party believes constitutes, contains, or reflects information protected by the
18 attorney-client privilege, the work product doctrine, or any other privilege or
19 immunity from discovery (“Privileged Document”) shall not constitute a waiver or
20 estoppel with respect to such Privileged Document. In the event of such
21 inadvertent disclosure of a Privileged Document, the Producing Party may at any
22 time provide written notice to the parties receiving a Privileged Document
23 requesting that all copies of such Privileged Document(s) be returned to the
24 Producing Party. Within a reasonable time of the Producing Party providing such
25 written notice, the Producing Party shall also provide a privilege log for each such
26 Privileged Document, including the privilege(s) claimed for each document and a
27 description of each document. All parties receiving such written notice shall
28 immediately destroy or return all originals and copies of the Privileged

Document(s) described in the notice, including the deletion of such material from any litigation-support or other database; shall destroy all notes or other work product reflecting the contents of the Privileged Document(s); and shall not use such Privileged Document(s) or any information copied or extracted therefrom; provided, however, that any party receiving such notice, after returning the Privileged Document, may, within fifteen (15) court days after receiving such notice, and on reasonable notice to all other parties and based on a ground other than the inadvertent production of such document, move for an order challenging the claim of privilege for such document. In making such a motion, the moving party shall not disclose the content of the Privileged Document(s) at issue or any information copied or extracted therefrom, except as ordered by the Court.

4. CHALLENGING CONFIDENTIALITY DESIGNATIONS

4.1 Timing of Challenges

Unless a prompt challenge to a Designating Party's confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary economic burdens, or a later significant disruption or delay of the litigation, a Party does not waive its right to challenge a confidentiality designation by electing not to pursue a challenge promptly after the original designation is disclosed.

4.2 Meet and Confer

A Party that elects to initiate a challenge to a Designating Party's confidentiality designation must do so in good faith and must begin the process by conferring with counsel for the Designating Party. In conferring, the challenging Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A challenging Party may proceed to the next stage of the challenge process only if it has engaged in this meet and confer process first.

1 **5. ACCESS TO AND USE OF PROTECTED MATERIAL**

2 5.1 Basic Principles

3 A Receiving Party may use Protected Material that is disclosed or produced
4 by another Party or by a non-party in connection with this case only for
5 prosecuting, defending, or attempting to settle this litigation. Such Protected
6 Material may be disclosed only to the categories of persons and under the
7 conditions described in this Order. When the litigation has been terminated, a
8 Receiving Party must comply with the provisions of Section 10 of this Protective
9 Order, “Final Disposition.”

10 5.2 Disclosure of “CONFIDENTIAL” Information

11 Unless otherwise ordered by the Court upon good cause shown or permitted
12 in writing by the Designating Party, a Receiving Party may disclose information or
13 items designated “CONFIDENTIAL” only to:

14 (a) the Receiving Party’s Outside Counsel in this action and
15 employees of said Outside Counsel to whom it is reasonably necessary to disclose
16 the information for this litigation;

17 (b) the officers, directors, and employees, including In-House
18 Counsel, of the Receiving Party to whom disclosure is reasonably necessary for this
19 litigation;

20 (c) Experts (1) to whom disclosure is reasonably necessary for this
21 litigation and who have signed the Acknowledgment and Agreement to Be Bound
22 attached as Exhibit A (“Agreement to Be Bound”), and (2) who have become a
23 Qualified Expert pursuant to the procedures set forth in Section 6;

24 (d) the Court and its personnel;

25 (e) court reporters, their staff, and Professional Vendors to whom
26 disclosure is reasonably necessary for this litigation;

27 (f) during (or in preparation for) their depositions, witnesses in the
28 action to whom disclosure is reasonably necessary and who have signed the

1 Agreement to Be Bound; and

2 (g) the author of the designated document or the original source of
3 the information, any person to whom such “CONFIDENTIAL” information was
4 previously communicated, or any person to whom disclosure was in fact made
5 during the regular course of business.

6 5.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’
7 EYES ONLY” Information

8 Unless otherwise ordered by the Court upon good cause shown, or permitted
9 in writing by the Designating Party, a Receiving Party may only disclose
10 information or items designated “HIGHLY CONFIDENTIAL – ATTORNEYS’
11 EYES ONLY” to:

12 (a) the Receiving Party’s Outside Counsel in this action and
13 employees of said Outside Counsel to whom it is reasonably necessary to disclose
14 the information for this litigation;

15 (b) Experts (1) to whom disclosure is reasonably necessary for this
16 litigation, (2) who have signed the Agreement to Be Bound, and (3) become a
17 Qualified Expert pursuant to the procedures set forth in Section 6;

18 (c) the Court and its personnel;

19 (d) court reporters, their staffs, and Professional Vendors to whom
20 disclosure is reasonably necessary for this litigation; and

21 (e) the author of the designated document or the original source of
22 the information, any person to whom such “HIGHLY CONFIDENTIAL –
23 ATTORNEYS’ EYES ONLY” information was previously communicated, or any
24 person to whom disclosure was in fact made during the regular course of business.

25 **6. QUALIFICATION OF EXPERTS**

26 6.1 Procedure and Requirements for Qualification

27 Unless otherwise ordered by the court or agreed in writing by the
28 Designating Party, an Expert must become authorized to view any materials

1 designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
 2 ATTORNEYS’ EYES ONLY” (i.e., a “Qualified Expert”). To become a Qualified
 3 Expert, the Party retaining the Expert (the “Retaining Party”) must provide to any
 4 other Party (1) the full name of the Expert and the city and state of his or her
 5 primary residence, (2) a copy of the Expert’s current curriculum vitae, (3)
 6 disclosure of any previous or current relationship (personal or professional) with
 7 any of the Parties; and (4) a signed copy of the Agreement to be Bound.

8 6.2 Objections to Qualification

9 A Party (the “Objecting Party”) that receives a request to qualify an Expert
 10 pursuant to Section 6.1 shall have five (5) court days from receipt of all information
 11 required in Section 6.1 to object in writing to an Expert becoming a Qualified
 12 Expert under Section 6.1. Any such objection must set forth in detail the grounds
 13 on which it is based. After the expiration of the 5-day period, if no objection has
 14 been asserted, the Expert will become a Qualified Expert.

15 6.3 Procedure for Responding to Objections for Qualification

16 If an objection is timely asserted, the Retaining Party must meet and confer
 17 with the Objecting Party to attempt to resolve the matter by agreement. If no
 18 agreement is reached, the Retaining Party may file a motion pursuant to Civil Local
 19 Rule 37 (and in compliance with Civil Local Rule 79-5.1, if applicable) seeking
 20 permission from the court to qualify the Expert under Section 6.1.

21 7. PROTECTED MATERIAL SUBPOENAED OR ORDERED 22 PRODUCED IN OTHER LITIGATION

23 If a Receiving Party is served with a subpoena or an order issued in other
 24 litigation that seeks disclosure of any information or items designated by the
 25 Producing Party in this action as “CONFIDENTIAL” or “HIGHLY
 26 CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” the Receiving Party must so
 27 notify the Producing Party in writing promptly upon learning that the subpoena or
 28 order seeks disclosure of such information or items. Such notification must include

1 a copy of the subpoena or court order. The Receiving Party also must immediately
2 inform in writing the Party who caused the subpoena or order to issue in the other
3 litigation that some or all of the material covered by the subpoena or order is the
4 subject of this Protective Order. In addition, the Receiving Party must deliver a
5 copy of this Stipulated Protective Order promptly to the Party in the other action
6 that caused the subpoena or order to issue. The purpose of imposing these duties is
7 to alert the interested parties to the existence of this Protective Order and to afford
8 the Designating Party in this case an opportunity to try to protect its confidentiality
9 interests in the court from which the subpoena or order issued. The Designating
10 Party shall bear the burdens and the expenses of seeking protection in that court of
11 its confidential material, and nothing in these provisions should be construed as
12 authorizing or encouraging a Receiving Party in this action to disobey a lawful
13 directive from another court.

14 **8. UNAUTHORIZED DISCLOSURE OF PROTECTED**
15 **MATERIAL**

16 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
17 Protected Material of the Producing Party to any person or in any circumstance not
18 authorized under this Protective Order, the Receiving Party must immediately (a)
19 notify in writing the Designating Party of the unauthorized disclosures, (b) use its
20 best efforts to retrieve all copies of the Protected Material, (c) inform the person or
21 persons to whom unauthorized disclosures were made of all the terms of this Order,
22 and (d) request such person or persons to execute the Agreement to Be Bound.

23 **9. FILING PROTECTED MATERIAL**

24 Without written permission from the Designating Party or a court order
25 secured after appropriate notice to all interested persons, a Party may not file in the
26 public record in this action any Protected Material. A Party that seeks to file under
27 seal any Protected Material must comply with Civil Local Rule 79-5.1.
28

1 **10. FINAL DISPOSITION**

2 Unless otherwise ordered or agreed in writing by the Producing Party, within
 3 sixty (60) days after the final termination of this action, each Receiving Party must
 4 return all Protected Material to the Producing Party or destroy all Protected
 5 Material. As used in this subdivision, “all Protected Material” includes all copies,
 6 abstracts, compilations, summaries or any other form of reproducing or capturing
 7 any of the Protected Material. Whether the Protected Material is returned or
 8 destroyed, the Receiving Party must submit a written certification to the Producing
 9 Party (and, if not the same person or entity, to the Designating Party) by the sixty-
 10 day deadline that confirms all Protected Material was returned or destroyed and
 11 that affirms that the Receiving Party has not retained any copies, abstracts,
 12 compilations, summaries or other forms of reproducing or capturing any of the
 13 Protected Material or any information copied or extracted therefrom.

14 Notwithstanding this provision, Outside Counsel are entitled to retain an archival
 15 copy of all pleadings, motion papers, transcripts, legal memoranda, correspondence
 16 and attorney work product, even if such materials contain Protected Material. Any
 17 such archival copies that contain or constitute Protected Material remain subject to
 18 this Protective Order as set forth in Section 2 of this Protective Order, “Duration.”

19 **11. GOOD CAUSE STATEMENT**

20 Rule 26(c) of the Federal Rules of Civil Procedure permits a court, for good
 21 cause, to issue a protective order “requiring that a trade secret or other confidential
 22 research, development, or commercial information not be revealed or be revealed
 23 only in a specified way.” Fed. R. Civ. P. 26(c)(1)(G). Good cause exists to issue a
 24 protective order where a party shows (a) that the information constitutes a trade
 25 secret or other confidential information contemplated by Rule 26(c), and (b) that
 26 disclosing the information would be harmful to the party’s interest in the property.
 27 *Nutratech, Inc. v. Syntech (SSPF) Int’l, Inc.*, 242 F.R.D. 552, 554-55 (C.D. Cal.
 28 2007). The Parties agree that good cause exists to protect their “CONFIDENTIAL”

1 and “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information in
2 the manner set forth above. Absent the protections afforded under this Protective
3 Order, the Parties would suffer serious competitive injury from the disclosure of
4 their sensitive and proprietary information.

5 **12. MISCELLANEOUS**

6 **11.1 Right to Further Relief**

7 Nothing in this Order abridges the right of any person to seek its
8 modification by the Court in the future.

9 **11.2 Right to Assert Other Objections**

10 By stipulating to the entry of this Protective Order, no Party waives any right
11 it otherwise would have to object to disclosing or producing any information or
12 item on any ground not addressed in this Stipulated Protective Order. Similarly, no
13 Party waives any right to object on any ground to use in evidence any of the
14 material covered by this Protective Order.

15
16 **IT IS SO ORDERED.**

17
18 Dated: 2/7/13

19 /s/ Andrew J. Wistrich
20 The Honorable Andrew J. Wistrich
21 U.S. Magistrate Judge
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Attorneys for Defendant and Counterclaimant
MasterCard International Inc.

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
_____ [print or type full address], declare under penalty of perjury
that I have read in its entirety and understand the Stipulated Protective Order that
was issued by the United States District Court for the Central District of California
on _____ [date] in the case of *SmartMetric, Inc. v. Mastercard*
Int'l Inc. and Visa Inc., Case No. 11-07126 MWF (FMOx). I agree to comply with
and to be bound by all the terms of this Stipulated Protective Order and I
understand and acknowledge that failure to so comply could expose me to sanctions
and punishment in the nature of contempt. I solemnly promise that I will not
disclose in any manner any information or item that is subject to this Stipulated
Protective Order to any person or entity except in strict compliance with the
provisions of this Stipulated Protective Order.

I further agree to submit to the jurisdiction of the United States District Court
for the Central District of California for the purpose of enforcing the terms of this
Stipulated Protective Order, even if such enforcement proceedings occur after
termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____